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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, THE FERTILIZER INSTITUTE, AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

RICHARD A. FLYE
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-5000

Counsel for
The Fertilizer Institute

JERRY C. JONES
JESS ASKEW III
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

Counsel for
Arkansas Poultry Federation

J. JEFFREY MCNEALEY
(Counsel of Record)
JANET J. HENRY
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
(614) 227-2000

MICHAEL K. GLENN
PORTER, WRIGHT, MORRIS & ARTHUR
1233 20th Street, N.W.
Washington, D.C. 20036
(202) 778-3000

Counsel for
Champion International Corporation, American Paper Institute, National Forest Products Association, and American Iron and Steel Institute

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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BRIEF *AMICI CURIAE* OF CHAMPION INTERNATIONAL CORPORATION, AMERICAN PAPER INSTITUTE, NATIONAL FOREST PRODUCTS ASSOCIATION, AMERICAN IRON AND STEEL INSTITUTE, THE FERTILIZER INSTITUTE, AND ARKANSAS POULTRY FEDERATION IN SUPPORT OF PETITIONERS

I. INTRODUCTION

Champion International Corporation, the American Paper Institute, the National Forest Products Association, the American Iron and Steel Institute, The Fertilizer Institute, and the Arkansas Poultry Federation ("Industry *amici*") file this brief *amici curiae* in support of Petitioners. The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent has been filed with the Clerk. Industry *amici* represent private industrial and manufacturing companies who are affected by the lower court's rulings interpreting the Clean Water Act, but whose interests are separate and distinct from those of the federal agency and Arkansas public agency petitioners and whose circumstances are not the same as those of the particular municipal facility and the particular water quality circumstances at issue in this case.

Industry *amici* concur in the two questions presented by the petition of the State of Arkansas, *et al.* Industry *amici* also concur in the first and third questions presented by the petition of the Environmental Protection Agency.

The Clean Water Act issues addressed in the petitions for writ of *certiorari* are of great importance to industrial facilities which currently discharge or will in the future need to discharge treated process wastewater to interstate waterways. Industry *amici's* brief focuses on Clean Water Act statutory considerations and effects of the lower court's rulings which are supplementary to those set forth in the petitions. These additional considerations demonstrate that, in giving mandatory, extra-territorial effect and preeminent status to the federally approved water quality standards of downstream states, the Tenth Circuit erroneously interpreted the Clean Water Act as allowing downstream states to override the standards-setting policy choices and permitting decisions of source states. These considerations also demonstrate that the lower court erroneously restricted the exercise of federal discretion to resolve disputes among states concerning water quality standards applicable to discharges to interstate waterways. If allowed to stand, the Tenth Circuit's rulings—which do great violence to this Court's construction of the Clean Water Act in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ("*Ouellette*")—will create tremendous chaos in the administration of the Act, causing heretofore unimaginable difficulties in the permitting of industrial discharges to interstate waterways and their tributaries.

II. INTERESTS OF *AMICI CURIAE*

The effects of the Tenth Circuit's statutory rulings go far beyond the two states, the particular municipal wastewater treatment facility, and the particular interstate river basin at issue in this case. The lower court's rulings could affect literally thousands of rivers and streams, lakes and reservoirs, bays, estuaries, and coastal waters nationwide which form common boundaries between states or which flow from one state through one or more other states. Thousands of industrial facilities discharging to these interstate waterways and their tributaries, in conformance with the Clean Water Act as previously construed by this Court and by numerous lower courts, are potentially affected by the Tenth Circuit's unprecedented, absolutist interpretations of the Clean Water Act.

The American Paper Institute is a non-profit trade association whose members include companies which account for approximately 90 percent of the domestic manufacture of pulp, paper, and paperboard, and most of whom own or operate facilities which discharge treated process wastewater to interstate waterways or their tributaries pursuant to various requirements of the Clean Water Act.

Champion International Corporation ("Champion") is a member of the American Paper Institute and one of the

nation's largest producers of pulp, paper, and solid wood products. Champion owns and operates numerous mills and other facilities in North Carolina, Michigan, and Florida, among other states, which discharge treated process wastewater to interstate rivers or bays in accordance with the Clean Water Act (the "Act"), 33 U.S.C. §§ 1251, *et seq.*, as implemented through permits issued under the Act's National Pollutant Discharge Elimination System ("national discharge" or "NPDES" permits). Champion's Canton, North Carolina process wastewater discharge, in particular, has been the subject of a long-standing water quality standards dispute between the states of North Carolina and Tennessee. Because of that dispute and based on Tennessee's recommendations, in 1985 the U.S. Environmental Protection Agency ("EPA") took away from North Carolina the authority to issue a national discharge permit for the Canton mill. In another aspect of that dispute in 1986, the Supreme Court of Tennessee ruled—consistent with the opinion of the Seventh Circuit in *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)—that Tennessee could not bring an action to enforce its state water quality standards and common law remedies against Champion's North Carolina mill for allegedly polluting the Tennessee portion of an interstate waterway. *State v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986).[1] Champion is currently a petitioner before the U.S. Court of Appeals for the Fourth Circuit regarding an EPA-

[1] In 1987, this Court granted Tennessee's petition for writ of *certiorari*, vacated the judgment of the Tennessee Supreme Court and remanded the case for further consideration in light of this Court's decision in *Ouellette*. *Tennessee v. Champion Int'l Corp.*, *cert. granted, judgment vacated and remanded*, 479 U.S. 1061 (1987). By order dated May 21, 1987, the Supreme Court of Tennessee, at the request of the state, granted a voluntary nonsuit, without prejudice to any claims Tennessee might assert under the Clean Water Act as construed by this Court in *Ouellette*. No subsequent state law enforcement action has been brought by the State of Tennessee regarding the Canton mill discharge.

issued NPDES permit for the Canton mill, in which EPA's reliance on Tennessee's federally approved narrative water quality standard for color is at issue.[2]

Champion also operates a mill in Florida which discharges wastewater to a stream that empties into Perdido Bay, a boundary water between Alabama and Florida. The Attorney General of Alabama has filed a request for an evidentiary hearing on a recent EPA-issued NPDES permit for Champion's Florida mill. The basis of Alabama's request is that, contrary to the Tenth Circuit's decision below, the EPA-issued permit fails to insure compliance with Alabama's water quality standards, including its nondegradation policy. EPA has not yet ruled on whether to grant Alabama's request for a hearing.

The National Forest Products Association, of which Champion also is a member, is a non-profit association whose members include individual companies and other trade associations accounting for much of the timber managed and most of the timber harvested and solid wood products manufactured in the United States.

The American Iron and Steel Institute is a non-profit trade association whose members include companies which account for approximately 80 percent of domestic raw steel production, many of whom own or operate facilities which

[2] *Champion Int'l Corp. v. EPA*, No. 91-2302 (4th Cir. *petition filed* Jan. 3, 1991). In rejecting Champion's request for an evidentiary hearing on the applicability of *North Carolina's* color standard in September 1990, the EPA Administrator specifically cited and relied upon the Tenth Circuit's holding in *State of Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). *See also Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988). Champion is now challenging directly in the Fourth Circuit EPA actions taken in 1989 and 1990—*without* a finding of "undue impact on interstate waters"—rejecting North Carolina's narrative color standard as the basis for a color limitation in the EPA-issued Canton mill permit. The first question presented by the State of Arkansas, *et al.* in their petition herein thus also will be squarely presented in a brief due to be filed by Champion with the Fourth Circuit in the near future.

discharge treated process wastewater to interstate waterways or their tributaries.

The Fertilizer Institute is a non-profit trade association consisting of approximately 300 member companies which manufacture over 90 percent of all domestically produced fertilizers. The association's members operate thousands of facilities for the production, formulation, distribution, and sale of farm, lawn and garden fertilizers, many hundreds of which currently discharge, in conformance with the Clean Water Act, to interstate waterways or their tributaries.

The Arkansas Poultry Federation includes more than 1600 poultry growers, producers, and processors with operations in Arkansas, which together constitute a substantial sector of Arkansas industry. Members of the Arkansas Poultry Federation are major industrial dischargers into publicly-owned treatment works in Northwest Arkansas, including Fayetteville. In addition to their interest in Clean Water Act requirements affecting the discharge of their industrial wastewater, members of the Arkansas Poultry Federation are interested in clean water issues because they require an abundance of high-quality water in their poultry production and processing activities.

Two unprecedented Clean Water Act rulings of the Tenth Circuit—that Clean Water Act discharge permits must always insure compliance with federally approved downstream state water quality standards, and that the Act absolutely bans any new or increased discharges to waterways not currently meeting applicable water quality standards—have a direct and potentially devastating effect on Clean Water Act discharge permits for industrial discharges to interstate waterways and their tributaries. If the lower court's construction of the Act is allowed to stand, many existing permits for industrial discharges to interstate waterways may well be deemed deficient, and thus may be subject to more stringent discharge limitations

or prohibitions. Industrial facilities across the nation, such as those of *amici*, as well as publicly-owned facilities, face the prospect of having to curtail their existing permitted discharges (as determined pursuant to federally approved source state water quality standards) or—like the City of Fayetteville's new wastewater treatment facility—the prospect of being unable to obtain new permits to discharge (and thus to operate) at all.

III. SUMMARY OF ARGUMENT

In the name of always assuring compliance with EPA-approved downstream state water quality standards, irrespective of where the discharge source is located, the Tenth Circuit held that

> "no discharge to a navigable water . . . may be permitted unless compliance with all applicable water quality requirements, including the federally approved standards of affected downstream states, is assured."

State of Oklahoma v. Environmental Protection Agency, 908 F.2d 595, 615 (10th Cir. 1990). The lower court thus swept aside express provisions of the Clean Water Act which *do not mandate* compliance with downstream state water quality standards, whether federally approved or not. Section 303(c)(3) of the Act explicitly provides that a federally approved state water quality standard "shall thereafter be the water quality standard for the applicable waters of that State." No other provision of the Clean Water Act, including the "interstate dispute resolution" provisions of §§ 401(a)(2) and 402(d)(2), extends the mandatory reach of federally approved state water quality standards beyond the waters "of that State." The Tenth Circuit also rejected this Court's construction of the Act in *Ouellette*, in which this Court recognized the paramount status of a source state's water quality standards and recognized as well that any *exceptional* EPA decision to base an out-of-state source's discharge limitations on down-

stream state law requirements is, at most, *discretionary*, *i.e.*, any such EPA decision must be preceded by an EPA finding of "undue impact on interstate waters."

The Tenth Circuit's second unprecedented Clean Water Act interpretation, that

> "where water quality standards violations are already occurring in the receiving waters, no additional point source discharge to those waters may be permitted if it would contribute [even by an undetectable amount] to the condition that produced the violations . . ." (908 F.2d at 634),

is based on an equally flawed reading of the Clean Water Act as imposing an absolute prohibition on any new or increased discharges to a waterway that is not currently meeting applicable water quality standards. Even assuming the lower court's first ruling regarding the mandatory compliance status of downstream state standards is correct (which it is not), the Act does not prohibit absolutely all new or increased discharges to waterways not currently meeting water quality standards. Although stringent conditions are required in permitting new or increased discharges, the statute has never been read to forbid categorically any new or increased discharges to such waters.

IV. ARGUMENT

Primary focus is given in this brief to the lower court's legal interpretation that the Clean Water Act mandates compliance in all cases with the federally approved state water quality standards of any affected downstream state.[3]

[3] It is unnecessary to address the lower court's findings and conclusions regarding alleged non-compliance with Oklahoma's standards if, contrary to the lower court's ruling, a Clean Water Act discharge permit issued to a source located in Arkansas is not always required to insure compliance with the downstream state standards of Oklahoma (*i.e.*, in the absence of an exceptional EPA finding of "undue impact on interstate waters"). EPA made no such "undue impact" determination with respect to the Fayetteville discharge, and an appellate court lacks the authority to make such a determination in the first instance. Industry *amici* support, without repetition here, the assertions made in EPA's petition for *certiorari* that the Tenth Circuit seriously deviated from well established principles governing judicial review of agency actions, including the lower court's *ad hoc* interpretation of Oklahoma's standards and the court's findings *de novo* of an unacceptable impact on Oklahoma waters.

A. The Tenth Circuit's Unprecedented Requirement Of Mandatory Compliance With Downstream State Standards Conflicts With This Court's Prior Construction Of The Act And Should Be Reviewed By This Court

Section 303(c)(3) of the Act, 33 U.S.C. § 1313(c)(3), contains an unambiguous statement of federal law concerning the territorial reach of federally approved state water quality standards:

> If the [EPA] Administrator . . . determines that such [a state-adopted new or revised water quality] standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.

Understandably, given this clear statutory language, no court previously has read these words—or any other words of the Act—to require that the federally approved water quality standards of a particular state always must be met by discharges which may affect that state's waters but which originate outside that state's boundaries.

1. The Tenth Circuit's Interpretation Conflicts With This Court's Construction of the Act In *Ouellette* And Will Create Chaos in the Administration Of the Act

The Tenth Circuit's ruling regarding the mandatory compliance status of downstream state water quality stand-

ards cannot be reconciled with this Court's prior construction of the Clean Water Act. Although *Ouellette* struck down the extra-territorial enforceability of a downstream state's common law of nuisance, rather than a downstream state's water quality standards, this difference is not crucial to deciding whether the Court's extensive consideration and construction of the Act in *Ouellette* should apply here and thus strike down the lower court's mandatory, extra-territorial enforcement of downstream state water quality standards. Indeed, this Court explicitly recognized in *Ouellette* that, in disputes among states concerning applicable *water quality standards*, an EPA finding of "undue impact on interstate waters" is necessary in order to provide EPA the authority to disapprove a source state's proposed permit standards and to, in effect, treat a downstream state water quality standard as if it were a federally promulgated standard.[4]

Application of this Court's construction of the Act in *Ouellette* to the issue presented here also is consistent with this Court's extensive discussion in that case of the Clean Water Act regulatory scheme and the Act's goals and policies. Among the important purposes and objectives of

[4] 479 U.S. at 490-91. Industry *amici* submit that, in order for EPA to give federal effect to downstream state water quality standards in the context of resolving an interstate water quality standards dispute, EPA must comply with procedural requirements akin to those associated with federal standards promulgation under § 303(c)(4) of the Act, 33 U.S.C. § 1313(c)(4). Indeed, it is difficult to distinguish, in substance or effect, an EPA decision resolving an "applicable standards" dispute concerning discharges to an interstate waterway from an EPA determination that it is necessary to promulgate "federal standards" for that waterway under § 303(c)(4). Like setting federal standards under § 303(c)(4), EPA's resolution of an interstate "applicable standards" dispute results in the designation of certain standards which will be generally applicable to all present and future discharges to that particular waterway. There is no reason to believe the Act allows EPA to simply *declare*, without more, that certain standards will govern all present and future discharges to a particular interstate waterway.

the Act, as this Court recognized in *Ouellette*, is to allow the *source state* considerable discretion to administer the national discharge permit program and make "policy choices" necessary to implement the Act's substantive requirements. 479 U.S. at 495. Concomitantly, downstream states whose waters may be affected are granted only a limited right to "interfere" with the source state's policy choices and permit decisions.[5] Downstream states are *not* authorized, in the words of this Court, to "effectively override," either directly or indirectly, the policy choices made by the source state in setting its standards in conformance with the Act. 479 U.S. at 495.

In giving downstream state standards mandatory compliance status vis-a-vis out-of-state sources, however, the lower court would authorize downstream states to regulate the conduct of out-of-state sources through the establishment of downstream state standards more stringent than those of the source state and thereby directly and severely interfere with the source state's policy choices and permit decisions. Moreover, since EPA may not disapprove state standards more stringent than those necessary to meet the Act's requirements (§ 510 of the Act, 33 U.S.C. § 1370), downstream states would be able to override discretionary policy choices and permit decisions which even EPA might otherwise make in the context of resolving interstate water quality standards disputes. Ultimate authority thus would be conferred not on the source state and EPA, as the Act directs and this Court recognized in *Ouellette*, but on any affected downstream state which chose to adopt a more stringent standard than the Act requires.

In contrast to not allowing downstream states to "circumvent" the national permit system through the extra-territorial enforcement of downstream state nuisance laws, which was forbidden by this Court in *Ouellette*, the Tenth

[5] See discussion of §§ 401(a)(2) and 402(d)(2) of the Act at pages 13-16, *infra*.

Circuit's decision here would allow a downstream state to *use* the national permit system to enforce its more onerous water quality-related requirements against an out-of-state source and thereby avoid or reduce the burdens that otherwise might have to be imposed on its own resident industries and municipalities.[6] The competing public and private interests of neighboring states, to the often considerable extent they are affected by water quality considerations, thus would be shifted in favor of downstream states, contrary to the clear policy mandate of the Clean Water Act.

This Court also emphasized in *Ouellette* the "important goals of efficiency and predictability" in the national permit system, under which Congress intended EPA and the states to establish "clear and identifiable" discharge standards. 479 U.S. at 496. No less than the multiplicity of often vague common-law nuisance rules to which a discharger might have been subject had *Ouellette* been decided in favor of downstream states, subjecting discharges in one state to the frequently differing and often vague state water quality standards of downstream states would create a highly inefficient, unpredictable, and chaotic national permit system. *Cf.* 479 U.S. at 496-97, quoting from *Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984).

Moreover, most companies operating and discharging in one state heretofore would have had no particular reason to be *informed* about the water quality standards of downstream states, much less have had the need or the opportunity to participate in their standards-setting processes. To now say, all of a sudden, that such out-of-state facilities are always subject to *previously-adopted* downstream state standards, without notice and opportunity to have been

[6] The Tenth Circuit, in fact, expressly conceded that it would allow downstream states' policy choices to override those of source states, so as not to impose a "disproportionate burden" on downstream state discharges. 908 F.2d at 606.

heard regarding the adoption of such standards, offends not only the standards-setting scheme of § 303 of the Clean Water Act but it also offends procedural due process requirements associated with standards-setting under § 303 of the Act and similar state law requirements. With respect to present and future state standards-setting activities, the Tenth Circuit's ruling means that every industrial discharger to an interstate waterway will have to determine the possible downstream state implications of its discharge (including any possible effects which may be *undetectable*), participate in the standards-setting processes of *all* such potentially affected downstream states, and attempt to insure (if possible) that the downstream states' standards do not conflict with those of the state where the source is located.

2. The Tenth Circuit's Interpretation Creates An Implausible Inconsistency In The Act And Robs EPA Of Any Effective Discretion To Resolve Interstate Water Quality Standards Disputes

Beyond § 303(c)(3) of the Act, the provisions of the Act most relevant to determining the compliance status of downstream state water quality standards are §§ 401(a)(2) and 402(d)(2) of the Act, 33 U.S.C. §§ 1341(a)(2) and 1342(d)(2), which specifically govern EPA's resolution of disputes among states concerning water quality standards applicable to discharges to interstate waterways.

Section 402(d)(2), in conjunction with § 402(b)(5), specifies the EPA interstate dispute resolution process which applies when a delegated state agency is the national discharge permit-issuing authority. Under § 402(d)(2), as this Court clearly articulated in *Ouellette*:

> [A]n affected [downstream] State does not have the authority to block the issuance of the [source state proposed] permit if it is dissatisfied with the proposed standards [of the source state]. An affected State's only recourse is to apply to the

> EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharge will have an undue impact on interstate waters.

479 U.S. at 490-91.

Section 401(a)(2), on the other hand, specifies the EPA interstate dispute resolution process which applies when EPA itself (as in the instant case) is the national discharge permit-issuing authority. Under § 401(a)(2) as well, as this Court indicated in *Ouellette*:

> Even though it may be harmed by the [source state] discharges, an affected [downstream] State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given [the limited rights to] notice and the opportunity to object to the proposed standards at a public hearing.

479 U.S. at 490.

Thus, concerning the Act's overall interstate dispute resolution processes, this Court determined in *Ouellette* that "affected [downstream] States occupy a subordinate position to source States in the federal regulatory framework." 479 U.S. at 491.

The Tenth Circuit, however, would give downstream states which have chosen to adopt water quality standards more stringent than federal law requires (or more stringent than the source state's standards) a *preeminent* position in the federal regulatory framework, principally through an expansive interpretation of § 401(a)(2) of the Act.[7] A critical issue raised by the lower court's interpre-

[7] "[W]e consider 33 U.S.C. § 1341 [§ 401 of the Act] particularly persuasive." 908 F.2d at 609. The Tenth Circuit also found support for its conclusion regarding the preeminence of downstream state standards in §§ 301(b)(1)(C) and 505(h) of the Act, 33 U.S.C. §§ 1311(b)(1)(C) and 1365(h). 908 F.2d at 606, 614-15. The lower court's interpretation of § 301(b)(1)(C), that more stringent limitations arising from the EPA-approved water quality standards of *all* states *must* be met, however, flatly contradicts the court's own acknowledgment of the *discretionary* nature of applying an affected downstream state's standards under the Act's interstate dispute resolution provisions. 908 F.2d at 611. Section 505(h) of the Act, 33 U.S.C. § 1365(h), which authorizes a downstream state whose water quality requirements are being violated to bring suit to compel EPA to enforce an "effluent standard or limitation" established under the Act, presupposes that EPA has failed to enforce a *federally promulgated* effluent standard or limitation or failed to enforce a federally enforceable effluent standard or limitation adopted (and implemented through a § 402 permit or § 401 certification) *by the source state*. Neither of these provisions supports the notion that EPA can be compelled by a downstream state to enforce against an out-of-state source the *downstream state's* non-federally promulgated water quality standards or effluent standards and limitations.

tation, but which the court's decision fails to address satisfactorily, is the inconsistency that would arise in how "applicable standards" disputes among states concerning discharges to interstate waterways are to be resolved depending on whether EPA is the permit-issuing authority (and § 401(a)(2) applies with respect to downstream state requirements) or a source state is the permit-issuing authority (and § 402(d)(2) applies with respect to downstream state requirements).

As interpreted by the Tenth Circuit, § 401(a)(2) would *require* that an EPA-issued permit contain conditions necessary to insure compliance with all applicable federally approved water quality requirements of affected downstream states. As indicated by this Court in *Ouellette*, however—and acknowledged by the court below as well (908 F.2d at 611)—when a source state is the permit-issuer and EPA is exercising its *discretionary* review and objection authority under § 402(d)(2), EPA obviously is *not required* to object to the source state-proposed permit if it fails to insure compliance with applicable water quality require-

ments of affected downstream states.[8] Thus, EPA would have no discretion regarding downstream state requirements if EPA itself issued the permit, but would have discretion if the source state issued the permit.

The Tenth Circuit attempts to deal with this implausible inconsistency, at least indirectly, by taking the position—in light of EPA's discretion to waive its objection authority under § 402(d)(3) of the Act—that EPA's discretionary authority under § 402(d)(2), when the source state is the permit-issuer, extends only to EPA's decision on whether or not to review a particular source state-proposed permit at all. 908 F.2d 611, n.19. According to the Tenth Circuit, § 402(d)(2)—like the court's interpretation of § 401(a)(2)—thus *requires* EPA, once it decides merely to *review* a source state-proposed permit, to insist that the permit comply with all applicable federally approved water quality requirements of affected downstream states. This means, of course, that EPA would not actually have any "undue impact" discretion to exercise once EPA decided to "review the impact" of the proposed discharge. Contrary to this Court's discretionary "undue impact" standard in *Ouellette* concerning § 402(d)(2) review, EPA's review of the proposed discharge under the lower court's interpretation would be limited to simply confirming whether or not downstream state water quality standards or other requirements would be violated.

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[8] Moreover, if the source state declines to modify the proposed permit in order to satisfy an EPA objection based on a downstream state's "recommendation," and EPA takes over permit-issuing authority for the facility (as in the instance of Champion's Canton, North Carolina mill permit, noted previously), EPA still is *not required* by the statute to insure compliance with an affected downstream state's applicable water quality requirements. Section 402(d)(4) of the Act directs EPA to issue a permit in this instance "in accordance with the guidelines and requirements of this chapter," without any explicit or implicit reference to the water quality requirements of downstream states.

There is no basis in the Act—or in this Court's construction of the Act's purposes, objectives, and interstate dispute resolution processes in *Ouellette*—to believe, as the Tenth Circuit would have it, that EPA's role in issuing permits for discharges to interstate waters and EPA's role in arbitrating applicable water quality standards disputes concerning discharges to interstate waters was intended by Congress to be reduced to a mechanical process of simply applying, whenever they are more stringent, the EPA-approved standards of downstream states. In summary, there is no basis for the lower court's conclusion that downstream state standards occupy a position of preeminence in the federal regulatory framework.

B. The Tenth Circuit's Absolute Prohibition Of New Discharges To Waters Not Meeting Water Quality Standards Lacks A Proper Statutory Basis And Warrants Supreme Court Review

Compounding the error of its initial misreading of the Act as giving preeminent status to downstream state standards, the Tenth Circuit also misread the Act as absolutely prohibiting any new or increased discharges to a waterway which is not currently meeting the downstream state's (or the source state's, it would appear) applicable water quality standards.

While it is undeniable, as the lower court noted, that a stated "goal" of the Act is the complete elimination of discharges of pollutants, and that any individual state may indeed strive for the "utter abolition" of discharges of pollutants (908 F.2d at 631, citations omitted), it is equally undeniable that the Act allows each state to decide for itself how far and how fast it will move towards achieving that goal. By allowing a downstream state's policy choice to utterly abolish discharges into *it's* portion of an interstate waterway to govern discharges occurring in an upstream state, in pursuance of the Act's total elimination "goal," the lower court would effectively allow the down-

stream state to utterly abolish discharges into the *upstream state's* portion of the interstate waterway, whether or not that was the upstream state's present policy choice. The Act has never been interpreted by EPA, or by any court heretofore, to require such an absolute ban on new or increased discharges, whether at the behest of a downstream state or not.

In support of its conclusion that such a prohibition exists in the Act and bolsters the lower court's interpretation of Oklahoma's standards, the Tenth Circuit relied almost exclusively upon its "common sense" understanding of the Act's goals and purposes and the "absurdity" of a policy that would allow a new discharge—including one whose individual impact is undetectable—to be made into a waterway which is not currently meeting applicable water quality standards. 908 F.2d at 631-32. With all due respect for the common sense of the lower court, the absence of "an *explicit* imprimatur" in the statute (908 F.2d at 632 (emphasis in original)) for the court's *absolutist* ruling obviously cannot be overlooked. The "national goal" of eliminating the discharge of pollutants into navigable waters by 1985, 33 U.S.C. § 1251(a)(1), upon which the lower court placed so much emphasis (908 F.2d at 630-32), has not been achieved by 1991 and by many accounts may not ever be achieved. Nor should undue weight be given to the equally slippery notion adopted by the Tenth Circuit that EPA's "watchful role" and other responsibilities as custodian of the navigable waters is sufficient to "subsume the power [or duty] to prohibit any new discharge of pollution, regardless of the magnitude of its impact, where the existing quality of the receiving waters does not meet required standards." 908 F.2d at 634.

How can EPA's powers or duties under the Act be so apparently *unlimited* when it comes to prohibiting new discharges, but be so *limited* when it comes to determining the applicable standards for discharges to interstate waterways? Industry *amici* submit that, based on the judgmental

and balancing processes set out in the statutory language itself, rather than absolutist notions imported into the statute, the Tenth Circuit got it exactly backwards. The statute explicitly grants EPA discretion to determine the applicable water quality standards for discharges to interstate waterways when a dispute arises among neighboring states. The statute, on the other hand, imposes no strict duty and confers no broad authority upon EPA to ban all new or increased discharges to waterways not currently meeting applicable water quality standards.

Indeed, the breadth of EPA's duties and the scope of EPA's authority in both of these respects cannot be more aptly described than by asking, in the words of this Court in *Ouellette*: Does the proposed discharge, in EPA's judgment, have an "undue impact" on the waters in question? In other words, requiring EPA to apply automatically the more stringent standards adopted by downstream states (or stay completely out of the interstate dispute, and thus defer to the source state), and requiring EPA to ban absolutely any new discharges to waterways not currently meeting the applicable standards, robs EPA of the judgmental and balancing role which Congress intended EPA to have under the Act, as recognized by this Court in *Ouellette*. Judicial review of EPA's exercise of that discretion, based upon a proper record of EPA's decision, is available to protect aggrieved parties against possible abuse.

V. CONCLUSION

The Tenth Circuit's grant of automatic, mandatory compliance status to the federally approved state water quality standards of all affected downstream states—giving them preeminent status over federally approved source state standards—is contrary to the Clean Water Act and this Court's construction of the Act in *Ouellette*. In disputes among states concerning the water quality standards applicable to discharges to interstate waterways, Congress

authorized EPA to review the standards in dispute and to determine, before giving federal effect to any downstream state standards or requirements, whether the proposed discharge would have an undue impact on interstate waters. In the absence of such an EPA finding, compliance with the water quality standards of affected downstream states is not required.

The lower court's absolute ban on new discharges to waterways not currently meeting applicable water quality standards is without any proper statutory basis.

For the foregoing reasons, in addition to those set forth in the petitions for writ of *certiorari*, *amici curiae* Champion International Corporation, American Paper Institute, National Forest Products Association, American Iron and Steel Institute, The Fertilizer Institute, and Arkansas Poultry Federation respectfully urge the Court to grant *certiorari* and reverse the decision of the Court of Appeals.

Respectfully submitted,

RICHARD A. FLYE
McKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-5000

Counsel for
The Fertilizer Institute

JERRY C. JONES
JESS ASKEW III
ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
(501) 375-9131

Counsel for
Arkansas Poultry Federation

J. JEFFREY McNEALEY
(Counsel of Record)
JANET J. HENRY
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
(614) 227-2000

MICHAEL K. GLENN
PORTER, WRIGHT, MORRIS & ARTHUR
1233 20th Street, N.W.
Washington, D.C. 20036
(202) 778-3000

Counsel for
Champion International Corporation, American Paper Institute, National Forest Products Association, and American Iron and Steel Institute

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